Supreme Court, U.S.
FILED

06-469 JUL 28 2006

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UNITED STATES SUPREME COURT

WILLIAM M. ROBERTSON

Petitioner,

V.

THE DEPARTMENT OF THE TREASURY

Respondent.

PETITION FOR A WRIT OF CERTIORARI

MERIT SYSTEMS PROTECTION BOARD
CASE NO. CH-0752-04-0138-I-1
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT No. 05-3156

FILED BY:
WILLIAM M. ROBERTSON
18975 West 117th Terrace
Olathe, Kansas 66061
(913) 599-6592
Petitioner, Pro Se

Copy 10 of 40

QUESTIONS PRESENTED FOR REVIEW

I.

Should the decision of the courts be reversed if it is based on the wrong legal standard of review in violation of the law and previous Supreme Court decisions?

II.

Does the term "final administrative or judicial determination" in the IRS Restructuring and Reform Act of 1998 §1203 require a prior action that is "independent of the merit systems process", as the petitioner argues, or is it the decision of the line manager/deciding official, as the Government contends?

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STATEMENT OF THE COURT'S JURISDICTION

This case is before the United States Supreme Court for a petition for writ of certiorari pursuant to Rule 10(c) which states "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court".

Merit Systems Protection Board Case No. CH-0752-04-0138-I-1. The administrative judge issued the initial opinion of the Board on February 2, 2005. Appellant did not seek review by the full Board thus rendering the initial decision the final decision of the Board. The initial decision became the final decision of the Board on March 9, 2005.

United States Court of Appeals for the Federal Circuit Case No. 05-3156. A timely petition for review was filed. Notice of Docketing was entered

on April 12, 2005. The decision of the Court was entered on May 4, 2006.

This petition is timely filed in compliance with the Federal Civil Judicial Procedure and Rules, Supreme Court of the United States Rules.

STATEMENT OF CASE

On November 24, 2003, the Appellant filed a timely appeal of the agency's decision removing him from his position of Accounts Management Field Director, SES-0340-00/03, at the Internal Revenue Service (IRS), Kansas City, effective November 10, 2003. The removal was based on the agency's allegation that the Appellant had violated the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98) §1203(b)(9).

The agency placed the standard of review as the criminal standard used in *U.S v. Pomponio*, 429 U.S. 10 (1976) during its first brief to the court. The decision of the administrative judge, however, indicated that she had used a lower standard, that being the case of *Mooney v. Dept. of Defense*, 44 M.S.P.R. 524 (1990). The Appellant argued the action as a violation of the law to the United States Court of Appeals for the Federal Circuit on May 2, 2006.

The appellant raised the affirmative defense that the express language of the RRA98 requires a "final administrative or judicial determination" prior to initiating a personnel action during his initial brief to the court. He contended that the agency committed a prohibited personnel practice in violation of this provision of the law. The administrative judge allowed the agency to refuse his request

for information relevant to this issue during the discovery phase of the hearing. The administrative judge used the case of *James v. Tablerion*, 363 F.3d 1352 (Fed.Cir. 2004) as her reference to deny the defense. The Appellant argued the decision was an inappropriate comparison and a violation of the express language of the law to the United States Court of Appeals for the Federal Circuit on May 2, 2006.

The United States Court of Appeals for the Federal Circuit affirmed the administrative judge's decision on May 4, 2006 without writing an opinion.

Since both issues are questions of federal law that have not been, but should be, settled by this Court, the appellant is petitioning this Court for a writ of certiorari.

Should the decision of the courts be reversed if it is based on the wrong legal standard of review in violation of the law and previous Supreme Court decisions?

It is the petitioner's opinion that the Court's decision is contrary to law in that it used the wrong standard to evaluate the evidence presented by the Agency. The Agency was burdened with proving by preponderance of the evidence, that Appellant willfully understated his tax liabilities on his 1998 tax returns. To prove its case, the Agency must prove all elements of its substantive charges against Appellant. *King v. Nazelrod*, 43 F.3d 663, 666 (Fed. Cir. 1994). In the instant case, the Agency was burdened with demonstrating the elements of willful intent as set out in either U.S. v. Pomponio, 429 U.S. 10 (1976), or 26 U.S.C. §7201.[1]

The administrative judge expressly relied on the ruling in *Mooney v. Dept. of Defense*, 44 M.S.P.R. 524 (1990) that intent can be inferred by a finding that the Appellant acted with a reckless disregard of the truth or ascertaining the truth. The standard articulated by the Board in *Mooney*, however, is

[1] See, Cumulative Bulletin Notice 99-27, I.R.B. 1999-21, 4 May 4, 1999.(App.408). Therein the agency stated its burden in §1203(b)(9) cases as: "the IRS must prove by a preponderance of the evidence that the IRS employee's act or omission was a voluntary, intentional violation of a known legal duty."

the wrong standard in reviewing removals under Internal Revenue Service Restructuring and Reform Act or 1998 (RRA98). The Internal Revenue Service has expressly stated that to support removal under RRA98 §1203(b)(9), its standard of proof is that expressed in *U.S. v. Pomponio*, 429 U.S. 10 (1976), which is a willful intent standard as the term is used in criminal provisions of the tax law. The precedent in the United States Supreme Court expressly established that reckless disregard of tax law is a lower standard for proving willful intent than that expressed in *Pomponio*. Because the court found that the agency proved willful intent by reckless disregard of the law, instead of by proving a voluntary, intentional violation of a known legal duty, the court decision is not in accordance with the law.

In determining willful intent, the administrative judge noted that intent is generally proven by circumstantial evidence. (Citing *Riggin V. Dep't of Health & Human Services*, 13 M.S.P.R. 50 (1982)). The administrative judge also stated, "intent may be referred (sic) from evidence of his reckless disregard for the truth or for ascertaining the truth, but falsity of his statement does not by itself establish his intent" (citing *Mooney v. Dep't of Defense*, 44 M.S.P.R. 524 (1990). The AJ's decision reviewed the evidence as to each alleged deficiency of Appellant's 1998 tax return under *Riggin* and *Mooney*. Without exception, the AJ determined

that the agency had established by a preponderance of the evidence that each deduction was willfully overstated or inappropriately taken. Errors on the tax return and inability to produce or recreate records was not the issue before the administrative judge. The errors were appropriately substantiated as misunderstanding of the tax laws and evidence was provided to the court substantiating lost records. The AJ inappropriately construed the tax liability to imply intent even though, at the time of the audit, the auditor, the Agency and the tax court did not make this determination. If the auditor, agency or tax court had made such a determination during the audit there would have been charges of fraud and much more stringent penalties would have been imposed.

The errors in the administrative judge's decision begin with the decision's failure to articulate the elements of the charges that the agency was burdened with proving. While the legal standard under *U.S. v Pomponio*, 429 U.S. 10 (1976) requires the agency to demonstrate a voluntary, intentional violaton of a known legal duty, there are distinct elements of willfulness which must be proved by a preponderance of the evidence. Specifically, the agency must prove that the Appellant had specific knowledge of the tax laws he violated on his tax returns. *Cheek v. United States*, 498 U.S. 192, 205 (1991)(*Pomponio* "construed the

willfulness requirement in the criminal provisions of the Internal Revenue Code to require proof of knowledge of the law".) The agency offered no proof, nor did it question Appellant on his knowledge of any of the Internal Revenue Code provisions relevant to the deductions. In fact, the official record of Appellant's training during his entire tenure with the IRS indicated no training on tax law at all. The administrative judge's decision does not address the agency's lack of evidence on the element of Appellant's knowledge of the law. Instead, the decision recites the evidence as to each deduction and decides that Appellant acted willfully, not because the agency demonstrated that Appellant had specific knowledge of the law and then intentionally violated it, but because the administrative judge determined that Appellant showed "reckless disregard of the law by failing to consult the agency's publications, directly or through the computer tax program he used or by seeking expert advise", or by similarly determining that, "In the absence of such effort, I find the appellant acted with reckless disregard of learning the truth...". The administrative judge does not cite, nor is Appellant aware of, any authority holding that Appellant was burdened with proving his explanations were objectively reasonable. In fact, the established law is to the contrary. In *Cheek v. United States*, 498 U.S. 192 (1992) the Supreme

Court addressed the issue of whether objective good-faith must be demonstrated to overcome the charge of willfulness:

> Cheek accepts the *Pomponio* definition of willfulness... but asserts that the District Court's instruction and the Court of Appeals' opinion departed from that definition. In particular, he challenges the ruling that a good-faith misunderstanding of the law or a good-faith belief that one is not violating the law, if it is to negate willfulness, must be objectively reasonable. We agree that the Court of Appeals and the District Court erred in this respect.
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> ...
>
> Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty. *Cheek v. United States*, 498 U.S. at 201.

In the instant case, Appellant had a duty properly state his tax liability on his tax return. He was aware of that duty. However, he also had a good-faith belief that he was complying with the law. The administrative judge's opinion

ignores Appellant's evidence regarding his misperception of the law during the preparation of his 1998 tax return, and incorrectly imposes an objective standard that Appellant should have consulted an array of tax publications to negate the deciding official's willfulness determination. To the extent that the AJ burdened Appellant with negating the deciding official's determination, the decision is not in accordance with law.

Notwithstanding the foregoing, the administrative judge erroneously chose a lower standard than required by law to apply the agency's preponderance of the evidence burden. As noted, the AJ based at least some of her determination of willfulness upon her finding that Appellant acted with willful disregard for ascertaining the truth. In *Pomponio*, the Supreme Court cited its holding in *United States v. Bishop*, 412 U.S. 346, (1973) that overturned the 9th Circuit's ruling that a lesser standard for willfulness applied in misdemeanor cases.

> The Court of Appeals in Bishop held that the evidence under the misdemeanor statute "need only show unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns filed." This Court rejected the view that this lesser degree of culpability was required for a violation of the

misdemeanor statute...". *U.S. v. Pomponio*, 429 U.S. 10, 12 (1976). (Internal cites omitted).

Consequently, the Supreme Court has unequivocally ruled that "unreasonable, capricious, or careless disregard for the truth or falsity of income tax returns" is a lesser degree of culpability than that required to show willfulness under the *Pomponio* standard. The administrative judge's application of a standard lower than required by the law renders the decision as not in accordance with law.

Finally, the administrative judge's decision is most easily demonstrated to be in error by looking at the authority cited as the standard for determining willful intent. The AJ cited *Mooney v. Dep't of Defense*, 44 M.S.P.R. 524 (1990) for the proposition that intent can be inferred by "reckless disregard for the truth or for ascertaining the truth...". While the *Mooney* standard may be appropriate for resolving intent issues in merit system cases involving such issues as making false statements to an agency, it is too low a burden for RRA98 cases.

In merit systems cases, a determination of willful intent does not end the inquiry. Even if willful intent is found in a specific case, considerations such as the *Douglas* factors are nevertheless examined. If the MSPB or the Court of Appeals finds mitigation is warranted under *Douglas*, the agency

action can be reversed. In RRA98 cases, however, a finding of willful intent ends all further considerations. Termination is the only discipline under RRA98 and neither the MSPB nor the Court of Appeals can mitigate the removal.

In amending the Internal Revenue Code, congress explicitly removes IRS employees from the protections of certain provisions of established systems law. (e.g. *Douglas* factors). Where merit system provisions were eliminated, however, other protections were implemented. Specifically, the mandatory removal of an IRS employee under §1203(a) does not occur until there has been an "administrative or judicial determination" that the IRS employee violated a provision of §1203(b). Appellant asserts that the protections include that the "administrative or judicial determination" of a §1203(b) violation be made independent and distinct from merit systems law. Additionally, as admitted by the agency in the instant case, willful intent must be demonstrated under criminal criteria, not the civil criteria of merit systems law reflected in *Mooney*. The AJ's decision that the agency had demonstrated willful intent by a preponderance of the evidence was incorrectly met under the civil criteria of *Mooney* instead of the criminal criteria of *Pomponio*. The Board's decision is, therefore, not in accordance with law.

During the oral argument before the Court of Appeals, the court agreed with the Appellant's observation that the language of the RRA98 did not make sense and commented to the Agency representative that the evidence they presented did not support their allegations or meet the *Pomponio* standard of willful intent. Never-the-less, the Court of Appeals affirmed the AJ's decision without providing a written opinion on these issues.

Does the term "final administrative or judicial determination" in the IRS Restructuring and Reform Act of 1998 §1203 require a prior action that is "independent of the merit systems process", as the petitioner argues, or is it the decision of the line manager/deciding official, as the Government contends?

Section 1203(b)(9) of the IRS Restructuring and Reform Act of 1998 requires an administrative or judicial determination that Appellant willfully understated his tax liability be made prior to and independent of the disciplinary process set out in 5 U.S.C. §7513. The court ignored this requirement in violation of the law.

The Agency ignored this requirement committing a prohibited personnel practice in violation of 5 U.S.C

§2302(b)(12), which prohibits taking an action if it violates any law, rule, or regulation implementing the merit system principles.

An affirmative defense was raised that the deciding official's determination that a violation of §1203(b)(9) had occurred was not sufficient to fulfill the requirement of the RRA98 law. The question before the court is whether, and/or in what circumstances, §1203 of RRA98 requires an administrative or judicial determination that is independent of the merit systems' process set forth in 5 U.S.C. §7513. Since the question involves the interpretation of law, the decision is reviewed de novo. *Pitsker v. O.P.M.*, 234 F.3d 1378, 1381 (Fed. Cir. 2000).

Section 1203(a) of RRA98 states:

> IN GENERAL – Subject to subsection (c), the Commissioner of the Internal Revenue Service shall terminate the employment of any employee of the Internal Revenue Service if there is a final administrative or judicial determination that such employee committed any act or omission described under subsection (b) in the performance of the employee's official duties. Such termination shall be a removal for cause on charges of misconduct.

The administrative judge's denial of Appellant's affirmative defense is based upon the "logic" of *James v. Tablerion*, 363 F.3d 1352 (Fed. Cir. 2004). The language in *Tablerion* that the administrative judge found persuasive appears to be the Court's statement that "Ms. Tablerion invoked the administrative process in the agency seeking to upset the deciding official's determination that she made a prohibited threat, or at least to convince the Commissioner that penalty short of removal would be sufficient." *James v. Tablerion*, 363 F.3d at 1359. The AJ erred in relying upon *dicta* in *Tablerion* instead of the express language of the statute.

In *Tablerion*, the court characterized the Commissioner's participation in §1203 cases as being part of the administrative process determining a violation of §1203(b). The court also stated that an employee "invokes" the review of the Commissioner to upset the deciding official's determination of the misconduct. The Court's statements on these topics deserve review.

Subsection (c) of §1203 states:

(c) DETERMINATON OF COMMISSIONER-

(1) IN GENERAL – The Commissioner of the Internal Revenue may take a personnel action other than

termination for an act or omission under subsection (a).

(2) DISCRETION – The exercise of authority under paragraph (1) shall be at the sole discretion of the Commissioner of Internal Revenue and may not be delegated to any other officer. The Commissioner of Internal Revenue, in his sole discretion, may establish a procedure which will be used to determine whether an individual should be referred to the Commissioner of Internal Revenue for determination by the Commissioner under paragraph (1).

(3) NO APPEAL – Any determination of the Commissioner of Internal Revenue under this subsection may not be appealed in any administrative or judicial proceeding.

Pursuant to the express language of the statute, the Commissioner's participation in §1203 cases is limited to a consideration of mitigation of removal. He/she has no participation in the determination of whether a violation of §1203 occurred and therefore cannot be found to be part of the "administrative determination" referenced in §1203(a).

The practice of the agency is that once the deciding official has determined that there is a violation of §1203 and that removal is mandated by the Act, the material relied upon by the deciding official is automatically forwarded to a

review board without further input or participation by the employee. The review board decides whether the case should be sent to the Commissioner for possible mitigation.[2] Consequently, to the extent that the *Tablerion* Court implied that the automatic mitigation consideration is part of the "administrative determination" on the merits of the charges, such implication is not supported by the practice of the agency.

Under rules of statutory construction, meaning is given to all the words of a statute and are not interpreted in such a manner as to render parts of the law meaningless. *McEntee v. M.S.P.B.*, No. 01-3066, (Fed. Cir. 2005) *citing, James v. Santella*, 328 F.3d 1374, 1381 (Fed. Cir. 2003) (stating that as a general rule a statute should not be construed in such a way that renders one of its parts inoperative). The AJ's determination that the "agency's system identifying the deciding official as the maker of the final administrative

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[2] The Appellant requested copies of all information used during the review of his case by the review board in considering whether his case should be forwarded to the Commissioner for possible mitigation. The Agency refused to provide the information on the grounds that the RRA98 protected their actions from review by any administrative or judicial body. The AJ allowed this explanation and allowed their refusal without considering the express language of the law. This is contrary to the law since the RRA98 only protects the final decision of the Commissioner from review and not the process leading up to that decision. The Appellant believes that the requested information would have provided substantial evidence that no such consideration was made in his case.

decision" renders superfluous the statutory language that there need be "a final administrative or judicial determination" that the employee violated a provision of §1203(b). There would be no need to make mention of administrative or judicial determination if congress simply meant for the regular merit system process to apply. If congress had intended to allow the deciding official, contemplated in 5 U.S.C. §7513(b)(4), to be the "final administrative decision" it could have incorporated, at least by reference, the merit system's process contained in 5 U.S.C. §7513. Instead, the language of §1203(a) clearly indicates a process outside of 5 U.S.C. §7513.

Section 1203(b) contains several prohibitions that require some degree of sophisticated legal interpretation before a violation can be reliably determined. The law does not indicate that certain of the prohibitions are required by judicial determination while other matters may be decided by administrative determination. The practice of the agency is that the deciding official, at whatever grade level he/she may be, constitutes the administrative determination. Regardless of what congress intended, the language of the law is what it is. Absent legislative history to the contrary, it would seem that reading RRA98 as simply meaning to strip from IRS employees the protections of the merit systems principles,

without providing some replacement protections is not warranted.

The express language of the IRS Restructuring and Reform Act of 1998 would appear to require an independent administrative or judicial determination prior to the implementation of processes under 5 U.S.C. §7513. Until an interpretation of this portion of the statute is established there will be continued burden placed on the courts to address these cases.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

WILLIAM M. ROBERTSON, Appellant
DOCKET NUMBER CH-0752-04-0138-I-1

v.

DEPARTMENT OF THE TREASURY, Agency
DATE: February 2, 2005

Dale L. Ingram, Esquire, Kansas City, Missouri, for the appellant.
Michael L. Salyards, Esquire, Dallas, Texas, for the agency.

BEFORE
Mary L. Detjen
Administrative Judge

INITIAL DECISION

On November 24, 2003, the appellant filed a timely appeal of the agency's decision removing him from his position of Accounts Management Field Director, SES-0340-00/03, at the Internal Revenue Service (IRS), Kansas City, effective November 10, 2003. The Board has jurisdiction over this appeal pursuant to 5 U.S.C. § 7543(d) & 7701. The appellant's requested hearing was held in Kansas City, Missouri, on April 13 and 14, 2004.

For the reasons discussed below, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Factual Background

The appellant entered service with the agency in 1978, left for military service, and returned to the IRS in 1983. Since 1986, he progressed through its ranks with increasingly responsible management positions. In July 1996, while he was stationed in Boston, Massachusetts, he married another agency employee, and for some time after their marriage, his wife maintained separate property and separate financial accounts. After their marriage, they filed joint tax returns, prepared by the appellant. In December 1997, they received two special needs children into their family; their adoptions were completed in January 1999. The appellant was selected for the agency's Executive Development Program (EDP) and entered the program in late March/early April 1998; he graduated in early October 1998. After graduating from the program, the appellant got a job as an Assistant District Director, and his family moved from Tewksbury, Massachusetts to Richmond, Virginia in January 1999.

The appellant was subsequently assigned to Kansas City as Field Director of Accounts Management, and the family moved in approximately 2000. In that position, the appellant supervised employees who answered questions from taxpayers about their accounts, including questions about tax laws. The appellant testified he was not involved in tax compliance or tax interpretation or application. Hearing Transcript at 277.

As part of the EDP, the appellant's tax returns were subject to mandatory audit. By letter dated April 25, 2000, E. Lee Turowski, the auditor, informed the appellant she was auditing his returns for 1997 and 1998 and issued a request for documents, Form 4564.[3] Agency file tab 41 at 59. The appellant testified he was surprised by the audit notice

[3] The audit was eventually expanded to the appellant's 1999 return (Agency file tab 4k), but that return was not included in the agency's removal action.

because he had already been accepted into the Senior Executive Service and he believed the audits were done earlier in the application process. Hearing Transcript at 285. According to the appellant, he believed, based on discussion with other class members who had not been audited, the agency decided not to do the audit. *Id.*

According to the appellant, he used a tax preparation program, TurboTax, to prepare the returns. The appellant testified he prepared the 1997 return while he was in the EDP in Washington, D.C., and worked on it when he could get home to Massachusetts and late in the evening. Hearing Transcript at 281. The situation was also difficult when he prepared the 1999 return because they had just moved to Richmond. *Id.* at 283. The appellant's wife testified that shortly after their move, their son became critically ill and was hospitalized.

The appellant's wife testified she did not participate in preparing the tax returns at issue, and her involvement was limited to, "Are we getting money? Do we owe money? Kind of saying, Where do I sign my name—that type of thing."[4] Hearing Transcript at 254-56. She also testified her position with the agency was not in tax preparation, administration, or enforcement. *Id.* at 255. On cross examination, the appellant's wife testified she did not ask him if he had all the documentation from her accounts that he needed when he was preparing the tax returns at issue. *Id.* at 265. She also testified that he would ask her if she knew where certain things were, but he never asked her to explain any of her documents. *Id.* at 265-66.

Ms. Turouwski conducted her initial interview with the appellant on May 8, 2000 (Agency file tab 41 at 78-83), and on December 28, 2000 she had a telephone interview with the appellant (*Id.* at 86). Ms. Turowski testified that during the audit she consulted with her supervisors and discussed all of the issues with them. Hearing Transcript at 36.

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[4] The appellant's wife was also disciplined for these returns, and the parties settled her appeal of the discipline. Hearing Transcript at 254.

With regard to the 1997 return, the audit determined the appellant (1) Underreproted interest income of $1,545; (2) overstated mortgage interest by $2,465; (3) did not have substantiation for claimed rental expenses of $4,971; (4) did not have adequate substantiation for $4,750 in cash charitable contributions; and (5) did not have adequate substantiation for non-cash contributions of $475 on schedule A. With regard to the 1998 return, the audit determined the appellant (1) Failed to include as income a state tax refund of $516 after itemizing deductions the previous year; (2) underreported interest inco9me of $1,149; (3) overstated mortgage interest in the amount of $1.700; (4) did not have substantiation for $52454 in rental expenses; (5) did not have adequate substantiation for $450 of non-cash charitable contributions.

Ms. Turowski concluded the audit of the 1997 return on February 20, 2001, and found the appellant owed $3,938 in additional taxes for 1997 and assessed an accuracy penalty of $787.60. Agency file tab 41 at 4-17. Ms. Turowski concluded the audit of the 1998 return on December 12, 2001, and found the appellant owed $3,738 in additional taxes and an accuracy penalty of $747. Agency file tab 4k at 1-34.

The appellant appealed the audit results. In February 2002 the appellant paid $4,472.69 in additional taxes and interest and the penalty for the 1997 return was waived. Agency file tab 4i. In October 2002, the appellant wettled the audit of the 1998 return. Agency file tab 13, Appellant's Exhibit I. In that settlement, the appellant paid $1,670 in additional taxes and an accuracy penalty of $334. *Id.* at 7. With interest, the appellant's total payment for the 1998 return was $2.619.72. *Id.* at 14.

On August 4, 2003, the agency proposed the appellant's removal on a charge of failure to properly file his Federal income tax returns. The charge is supported by two specifications, the first for his 1997 return and the second for

his 1998 return. With regard to the 1997 return, the agency alleged the appellant. at 14.

On August 4, 2003, the agency proposed the appellant's removal on a charge of failure to properly file his Federal income tax returns. The charge is supported by two specifications, the first for his 1997 return and the second for his 1998 return. With regard to the 1997 return, the agency alleged the appellant failed to claim interest income and overstated mortgage interest, rental expenses, and cash contribution resulting in an additional assessment in the amount of $2,772 plus interest. Agency file tab 4g. With regard to the 1998 return, the agency alleged the appellant willfully understated his tax liability, specifically understating interest income, failing to report as income his state refund, and overstating mortgage deductions, rental expenses and cash contribution resulting in an additional tax assessment in the amount of $1,670 plus interest and a negligence penalty. *Id.* In Specification 2, the agency also alleged that even if the appellant did not willfully understate his tax liability, he still failed to report additional income and overstated deductions. *Id.* Both specifications are alleged to be violations of the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.809. The second specification is charged in the alternative as a violation of the IRS Restructuring and Reform Act of 1998 (RRA), Section 1209(b)(9), which requires the agency to prove the appellant's actions with regard to the 1998 tax return were willful.[5]

The appellant made a written response to the proposal (Agency file tab 4e), and on October 24, 2003, the Commissioner of the Wage & Investment Division, Henry O. Lamar, Jr. determined the appellant's actions were willful in violation of Section 1203 and forwarded the matter to the Review Board (Agency file tab 4d; Hearing Transcript at 143). The Board determined the penalty of removal should

[5] The 1997 return predated the RRA and therefore was not charged as a violation of that statute.

not be mitigated (Agency file tab 4c), and Me. Lamar issued the decision to the appellant on November 7, 2003 (Agency file tab 4d).

The agency has the burden of proving the facts of its charge by preponderant evidence. A preponderance of the evidence is "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. §1201.56©(2) (2004).

The issues for consideration are (1) whether the appellant's failure to properly file his 1998 return was willful under 1203(b)(9) and therefore requires his removal; and (2) whether the improper filing of his 1997 and 1998 tax returns constituted misconduct, neglect of duty, malfeasance under 5 U.S.C. § 7543 and if so, whether the penalty of removal is appropriate under *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

Underreported Interest Income

In both the 1997 and 1998 tax returns, the appellant did not include interest accrued on certificates of deposit (CDs) from Fleet Bank that had not yet matured. The CDs were the property of the appellant's wife and belonged to her before her marriage to the appellant. Hearing Transcript at 269.

Ms. Turowski recalled the appellant's explanation of the interest income discrepancy was that he thought interest on CDs was not taxed until the certificates matured; she did not recall him citing any authority for that belief. HT at 19-22. Ms. Turowski did not recall the appellant stating that he believed the CDs were for an individual retirement account (IRA). The interest income from the CDs was not discussed after her first meeting with the appellant. *Id.* at 35. On redirect examination Ms. Turowski did not recall the appellant giving her a copy of the interest income statement from the bank although she requested it. Hearing Transcript at 109.

The appellant testified he had no CDs of his own, so he

had not had to deal with CD interest when he completed earlier tax returns. Hearing Transcript at 292. The appellant testified he thought the CDs were part of his wife's IRA, and he did not think [non-IRA] CD interest was taxable until the CD was redeemed. *Id.* at *295*. The appellant testified he did not get an Information Return 1099 from any bank but got a confusing consolidated statement with the IRA included. *Id.* In the settlement for his 1998 return, the appellant conceded he had underreported interest income of $1,149.00. Appeal file tab 13, Appellant's Exhibit I at 1.

In his written reply, the appellant alleged that the discrepancy arose because wife maintained a savings account, an individual retirement account (IRA), and CDs with First Bank[6], and he inadvertently included the interest from them with the IRA. Agency file tab 4e at 3-4. The appellant believed the bank records were unclear about how the interest was apportioned between taxable and nontaxable income, and his wife was unable to clarify how her IRA was apportioned. *Id.* at 4. The appellant stated in his written reply that he used the 1997 return as the template for the 1998 return, so the same discrepancies occurred when he interpreted his wife's documents. Agency file tab 4e at *5*.

I find the agency has established by preponderant evidence, the appellant underreported interest income in his 1997 and 1998 tax returns.

Overstating Mortgage Interest

On his 1997 and 1998 tax returns, the appellant included interest on a loan from the Thrift Savings Plan (TSP) as deductible mortgage interest.

Ms. Turowski testified that during the audit, the appellant explained the discrepancy by stating the loan from his retirement plan was to purchase a house, so he included the interest as a deduction. HT at 26. Ms. Turowski testified interest on the TSP loan was not a valid mortgage interest

[6] Through a merger, Fleet Bank became the bank which held the CDs.

deduction because the loan was not secured by the residence. Ms. Turowski testified the mortgage interest was not discussed after her first meeting with the appellant. On redirect, Ms. Turowski did not recall the appellant providing a copy of documents regarding the TSP loan although they were requested. Hearing Transcript at 110.
through a merger, Fleet Bank became the bank which held the CDs.

The appellant testified that he knew he could borrow from the TSP for a home and did it to obtain the down payment for their house in Massachusetts. Hearing Transcript at 294. The appellant further testified he received a statement from the TSP showing the interest paid, and he included that amount on his tax return as an interest expense.[7]

In the written reply, the appellant said he failed to appreciate the nuances in the definitions of "acquisition indebtedness" and "home equity indebtedness." The response acknowledged that because the TSP loan was not secured by the home, it was not deductible. The appellant explained the error as arising from the technical definitions contained in the Internal Revenue Code. The appellant further contended the error was not egregious because his experience as an IRS employee gave him only a good understanding of the tax code, not a thorough understanding. Agency file tab 4e at 4.

I find the agency has established by preponderant evidence the appellant overstated his mortgage interest deduction in his 1997 and 1998 tax returns.

Rental Expenses

On Schedule E the appellant claimed expenses for rental property of $10,610 in 1997 (Agency file tab 41 at 171), and expenses of $10,037 (Agency file tab 4k at 24) in 1998. The rental property was solely the appellant's. The audit report

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[7] In settlement of his Tax Court appeal, the appellant conceded the home mortgage interest adjustment for the 1998 tax return. Appeal file tab 13. Appellant's Exhibit I at 1.

for the 1997 return disallowed $1,500 in auto [travel] expenses; *$150* in supplies; $550 in cleaning and maintenance; $600 in management fees; and $1,090 in depreciation. Agency file tab 41 at *45*. The lack of receipts was the reason for disallowing the rental expenses. The depreciation expense was disallowed because the appellant provided no documentation, such as a settlement sheet or deed, to support his claimed basis in the property, $30,000. *Id.* at 46.

For 1998, the audit disallowed $2,100 in travel expenses; $589 in repairs; $150 in supplies; $65 in cleaning and maintenance; $500 in management fees; and $1,850 depreciation. Agency file tab 4k at 24.

Ms. Turowski testified that at their first appointment, the appellant gave her whatever documentation he had at the time, but it was not what she needed and it was not complete. HT at 29. Ms. Turowski also testified he brought in some records at their second meeting. Ms. Turowski testified the appellant said some records may have been lost in a move. *Id.* at 34-35. Ms. Turowski testified that at the conclusion of the second meeting, the appellant said he was going to try and get more records from a sister who managed the rental property. Hearing Transcript at 35. On redirect, Ms. Turowski testified the appellant did not provide any documents, such as a statement from the moving company, to support his claim the rental expense receipts were lost during a move.[8] Hearing Transcript at 111.

The appellant testified he had receipts or notes of repairs and things he had to replace. Hearing Transcript at 306. The appellant testified he used the simplest method to calculate depreciation that he thought would work and that was straight-line depreciation. *Id.* at 306-07. The appellant testified he calculated the depreciation using the tax program

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[8] In his appeal to the Board, the appellant presented an adjuster's letter identifying among items lost 10 boxes of "self –pack" valued at $55.00. Appeal file tab 13. Appellant's Exhibit J.

interview questions and references to be sure his interpretation was correct. *Id.* at 307.

According to his written response, the appellant originally purchased the property as his grandmother's residence, and, after she died in 1985, he made some alterations and rented the property to an unrelated tenant. Agency file tab 4e at 4. The appellant stated the deductions were taken for ordinary and necessary expenses incurred for upkeep and maintenance of the property, and he was unable to produce receipts at the audit because in the intervening three years, he moved from Massachusetts to Virginia and the box of receipts for rental expenses could not be found for production during the audit. *Id.* at *5.*

In settlement of the 1998 return, the appellant's auto/travel expense claims and depreciation were adjusted, and the remaining expenses were allowed. Appeal file tab 13, Appellant's Exhibit I at 1.

I find the agency established by preponderant evidence the appellant overstated his rental expenses on his 1997 and 1998 tax returns.

Charitable Contributions

On his 1997 tax return, the appellant claimed *$5,225* in charitable contributions—$4750 in cash and checks and *$475* in non-cash contributions. Agency file tab 41 at 33 & 169. In 1998, the appellant claimed $3,950 in charitable contributions—$3950 in cash and checks and *$450* in non-cash contributions. The audit disallowed the substantiation submitted for the appellant's cash contributions because it was based on estimates, not contemporaneous written records, and allegedly improperly included school tuition for the appellant's sister.

Ms. Turowski testified she asked the appellant to provide her with receipts, canceled checks or statements that he had from the charitable organizations, and he said that his cash charitable contributions were made in cash, not by check, and estimated. HT at 28-29. Ms. Turowski testified they tried to

partially reconstruct his charitable contributions at the first appointment. According to Ms. Turowski, at their second meeting in July, the appellant gave her a handwritten list of estimated contributions.[9] HT at 33. The appellant's list was based on his estimate based on past donations. Ms. Turowski asked if he had any other supporting documents to show he made the contributions, such as statements from the charitable organizations, and he said he did not. *Id.* at 34. The appellant subsequently contacted charitable organizations to substantiate his charitable deductions.

According to Ms. Turowski, in December 2000, she received statements from a church, the Shady Grove Christian Academy, and Lakeview Mission Center. Hearing Transcript at 38-39; Agency file tab 41 at 275-301. Ms. Turowski testified the statements from the institutions did not resolve the issue because the appellant said he donated cash, for which she doubted there would be records. Hearing Transcript at 40. Because of her questions, Ms. Turowski contacted the Lakeview Mission Center directly and learned there were no written records of the appellant's contributions, and the statement that had been provided was based on an estimate. Ms. Turowski testified that such a record does not meet the agency's standard of a reliable written record. *Id.* at 41. Ms. Turowski further testified there was no evidence either the appellant or Lakeview tracked his contributions at the time the contributions were made. *Id.* at 42.

With regard to the Shady Grove Christian Academy, Ms. Turowski testified she had the same suspicions about the documentation for cash payments. *id.* at 42-43. Ms. Turowski learned from following up with written questions that the

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[9] In her audit repo9rts, Ms. Turowski cited the following contributions: Tewksbury Police, Battered Women Shelter, Salvation Army, Goodwill, and Boy Scouts/Girl Scouts", $200 each. Agency file tabs 4k at 33 & 41 at 34. The appellant later submitted statements showing contributions to Lakeview Mission Center ($1,200 annually in 1997 and 1998), St. William's Church ($20 per week in 1997 and 1998), and Shady Grove Christian Academy ($3,200 annually in 1997 and 1998). *Id.* At 15 & 36.

payments were for tuition, which is not properly included as a charitable deduction. It was Ms. Turowski understanding, from her contact at the institution, that the appellant's payment was tuition for a sister who was attending the academy. Ms. Turowski also was told another sister of the appellant worked at the academy and provided the information to respond to Ms. Turowski's request for documentation of his contributions. *Id.* at *44-45*. Ms. Turowski also received a billing statement from the Academy for the period from July 1, 1998 through May 23, 2000. Agency file tab 41 at 284. Ms. Turowski was informed the Academy did not keep a record of who makes [tuition] payments and they do not keep copies of canceled checks. Hearing Transcript at 46. Ms. Turowski testified no one at the Academy told her the appellant was making tuition payments as a scholarship available to any student. *Id.*

On cross examination, Ms. Turowski testified the appellant said he paid cash and he never told her he paid tuition for his sister. Hearing Transcript at 78. Ms. Turowski testified she did not compare the appellant's check numbers with the check numbers on the statement. Ms. Turowski also testified she followed up on the information because the statement did not identify what the purpose of the payments the appellant made. Id. at 80.

Ms. Turowski also received a statement from St. William's Church in Tewksbury, Massachusetts. Agency file tab 41 at 275; Hearing Transcript at 47. Ms. Turowski testified that she called the pastor to ask what records supported his statement the appellant had made weekly donations of $20.00. According to Ms. Turowski, the pastor said he had asked the people who collected the offerings if the appellant had made any donations and was told he gave around $20 per week. Hearing Transcript at 47. The pastor said there were no written records of the appellant's donations. Ms. Turowski testified that when she asked how the people knew the appellant gave $20 per week, the pastor said it would be the canceled checks, but that contradicted the

appellant who said the donations were cash. *Id.* at 48. Ms. Turowski believed she asked if contributions were tracked by numbered envelopes, and learned the appellant's were not.

Ms. Turowski also tried to evaluate the appellant's claimed contributions against his bank records, but the appellant did not provide his records and the financial institutions did not fully comply because records could not be accessed due to mergers among the banks. Ms. Turowski testified the information she did receive did not substantiate that the appellant had written any checks to the charitable organizations or that the contributions to the Academy were not for tuition and fees. Hearing Transcript at 51. Ms. Turowski testified she reviewed the bank statements in an effort to see a correlation between cash withdrawals and the cash contributions the appellant claimed, but did not see any specific links. *Id.*

Ms. Turowski testified the responses from all three charitable institutions were not sufficiently reliable under the agency's guidelines, and she discussed the responses she received with her supervisor. Hearing Transcript at 48-49. After their discussion, it was recommended the deductions be disallowed. *Id.* at 49.

On redirect examination, Ms. Turowski testified the appellant provided receipts for his claimed non-cash contributions after their first meeting. Hearing Transcript at 95. Ms. Turowski testified that unlike the version of the receipt in Agency Exhibit 4[10], the first pages of the receipts she received were blank and did not have monetary amounts circled and descriptions of the items' condition. *Id.* at 96. In looking at both the receipts she received and those from his appeal of the audit, Ms. Turowski believed that the handwriting in both was the same. *Id.* at 98.

The appellant's wife testified she did not make any cash charitable contributions, and she attended a Catholic church

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[10] Agency Exhibit 4 (Agency file tab 14) contains documents the appellant submitted to the Tax Court on appeal.

during Lent and the holidays while their family lived in Massachusetts, but she could not recall the church's name until prompted that St. William's was in Tewksbury. Hearing Transcript at 261-63. She testified she did not go to church without the appellant, and she never saw him donate any cash to an institution or charity. Id. at 263-64. The appellant's wife also testified she was not involved in the appellant's gifts to the church. *id.* at 264. The appellant's wife testified she was aware the appellant's sister, nephew, and niece attended a religious school and a sister worked there, but she did not know its name until this case. Hearing Transcript at 270-7 1.

The appellant testified that based on his religious training, he gave 10% of his earnings to church.[11] Hearing Transcript at 297. The appellant further testified that as he got older, he diversified his contributions to more organizations than the church. *Id.* On cross examination, the appellant conceded that his claimed charitable contributions were about 4% of his income and he gave less than 1% of his income to his home church. Hearing Transcript at 314.

The appellant also testified he usually tried to keep notes or make a diary entry regarding the amounts, dates, and recipients of his donations, and he used that information at the time he was preparing his tax return. *Id.* at 297-98. The appellant testified that nieces, nephews, and sisters have attended Shady Grove Academy, and one sister works in its office and sometimes teaches. Hearing Transcript at 299. The appellant testified he made donations to Shady Grove so that if they had a student who could not make a tuition payment, it could be made up with his donation, which was not earmarked for anyone. *Id.* The appellant testified that in some years, not the ones in issue, he had paid tuition for his adopted sister who was a student there, but he did not claim it as deduction then. *Id.* at 301-02. The appellant testified his

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[11] The appellant testified he became an ordained Pentecostal pastor during the 1960's. Hearing Transcript at 275.

sister working at the academy knew he paid tuition for his stepsister sometimes, but she did not know when he did and was not part of the process of his giving to the school or paying tuition. *Id.* at 302. The appellant testified that the check numbers on the Shady Grove ledger did not correspond to check numbers he was using at that time. *Id.* at 303. The appellant explained he had only one checking account but the check numbers were different because it changed from one bank to another. *Id.* The appellant testified his parents, who have since died, paid his sister's tuition. *Id.* at 304.

On cross examination, the appellant testified he gave the donation to Shady Grove Academy in cash by giving it to a sister, not the one who works there, who gave it to the "church" [sic]. Hearing Transcript at 327. The appellant also conceded some of his contributions to Shady Grove were not allowed in the Tax Court appeal; he believed it was disallowed for 1997 but restored for 1998. *id.* at 327-28. With regard to his testimony on direct that his sister who worked at the academy was mistaken in saying he paid another sister's tuition, he testified he did not correct her mistake because it was not a high priority for him at the time. *Id.* at 331.

The appellant testified he gave cash donations because he had been the victim of identity theft during the early 1980s and it seemed safer to him to use cash. The appellant testified he got the large amounts of cash he carried by writing large checks to his credit union account. *id.* at 301. On cross examination the appellant testified he made his contributions to the Lakeview Mission Center by handing cash to the Pastor on trips back to Texas. Hearing Transcript at 316. The appellant testified he kept notes of these transactions and they were among the documents lost. *Id.*

On cross examination the appellant testified he had only one credit card and that he wrote checks but not for the things at issue. Hearing Transcript at 334. The appellant testified he opened a checking account in his new location after moving. *Id.*

With regard to non-cash contributions, the appellant testified he tried to keep the form he was given by the agency and use that as the basis for what he put in the tax return. *Id.* at 298. With regard to Ms. Turowski's testimony that the receipts he gave her in the audit and on appeal were different, the appellant testified the same information was on the back of the receipts he gave her and he pointed it out to her, but because the appeal process was not personal, he wrote the information from the back to the front so it was easy for the appeals officer to see. The appellant further testified that in hindsight, he should not have altered the document.

On cross examination, the appellant admitted the Salvation Army receipts he submitted in the Tax Court appeal contained information on the condition of the items donated that was not on the receipts he gave Ms. Turowski during the audit. Hearing Transcript at 321-22. The appellant further testified that where the original receipts referred to high or low value, he equated that with the condition of the item and wrote down the condition he recalled. *Id.* at 323.

The appellant also testified that he only claimed *$450* in non-cash contributions on his [1998] tax return because that was the amount of the only receipt he could find when he prepared the return. Hearing Transcript at 328. The appellant testified during the audit process he found other receipts and provided them, so not all were lost in the move. *Id.* at 329. The appellant also testified that in the Tax Court appeals process not all of his cash contributions were allowed, and the only documents he provided were the statements from St. William's Church, Lakeview Mission, and Shady Grove Christian Academy. *Id.* at 328-29.

In his written response, the appellant stated contributions to Eastern Veterans, Battered Women's Shelter, Easter Seals and others were not allowed because he failed to ask for receipts at the time of the donation. Agency file tab 4e at *5*. The appellant also said he was aware they had made church offerings as well as donations to other charitable organizations and his deduction was certainly in line with

what he knew was his family's practice of charitable giving. The appellant was aware he had no receipts for the church offerings but he believed that if there was need, the church would be able to provide satisfactory validation of the contributions claimed. The appellant contacted William O'Donnell of St. Williams Catholic Church who identified the appellant and his wife as regular church goers whose contributions were at least $20 per week in 1997 and 1998.

When asked if Pastor O'Donnell knew how much the appellant gave at St. William's, the appellant responded, "I know he heard what I asked for on the phone." Hearing Transcript at 318. The appellant was then evasive about whether he had asked Pastor O'Donnell to provide a specific contribution amount, and eventually the appellant testified he told Reverend O'Donnell it averaged $20-30 per week, although they did not attend every week. The appellant testified he made the contribution by putting cash in an envelope with his name on it. *Id.* at 318-19. In the Tax Court appeal, the appellant was allowed a deduction of $1,040 for his contribution to St. William's. *Id.* at 319.

In his written response, the appellant said the non-cash contributions were the result of combining households with his wife. Agency file tab 4e at *5.* The appellant further stated that, even though the auditor determined the correct value was $2,278, he only was allowed credit for the amount he initially claimed.

I find the agency has established by preponderant evidence the appellant overstated his cash and non-cash charitable donation deductions on his 1997 and 1998 tax returns because he did not have adequate substantiation of the amounts he claimed on Schedule A of his tax return.

State Tax Refund

On his 1998 return, the appellant did not include a state tax refund of *$516* although he had deducted his state income tax on Schedule A the previous year.

Ms. Turowski testified because the appellant itemized

deductions in 1997, he was required to include his 1997 state income tax refund as income in 1998. HT at 23-24. Ms. Turowski said the instructions for including this as income are on the front page of Form 1040. Ms. Turowski also testified she used TurboTax, not as part of her official duties, and the program guides users through each type of income. Ms. Turowski did not recall any discussion with the appellant about why he failed to include the refund. *Id.* at 25.

The appellant testified they had just moved from Massachusetts and he did not recall whether mail was being forwarded or not, or if he ever got the 1099G form which would show the state refund as income. Hearing .Transcript at *307.* The appellant testified that when he went through the tax program, he did not recall getting a state refund, and there had been questions about his state tax return that had been "answered back and forth." The appellant further testified that the refund was deposited directly into his bank and he just forgot it. *Id.*

In his written reply, the appellant said his state income tax refund was directly deposited into his bank account, and he did not recall there had been a refund from Massachusetts and there were no independent documents in his possession showing the deposit of the refund. Agency file tab 4e at 6.

I find the agency has established by preponderant evidence the appellant understated his income on his 1998 tax return by failing to include a state tax refund for which he had previously taken a deduction.

The Appellant Willfully Understated his 1998 Federal Tax Liability

Section 1203 ("Termination of Employment for Misconduct") of the Internal Revenue Service Reform and Restructuring Act of 1998 (RRA), Pub's. No. 105-206, title 1, 1203, 112 Stat. *685,* 720-21 (codified at 26 U.S.C. § 7804 note), states in relevant part:

> (a) in general. Subject to subsection (c), the Commissioner of Internal Revenue shall terminate the employment of any employee of the Internal Revenue Service if there is a final administrative or judicial determination that such employee committed any act or omission described under subsection (b) in the performance of the employee's official duties. Such termination shall be a removal for cause on charges of misconduct.
> (b) Acts or omissions. The acts or omissions referred to under subsection (a) are--
> (9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect; ...

Id. In *James v. Tablerion,* 363 F.3d *1352,* 1358 (Fed. Cir. 2004), the U.S. Court of Appeals for the Federal Circuit stated that "in the performance of the employee's official duties" includes the off-duty preparation of an IRS employee's individual tax return.

The issue for adjudication is whether the appellant's understatement of his 1998 tax liability was willful and not due to reasonable cause. For the reasons discussed below, I find the agency has established the appellant's understatement was willful and subject to the mandatory removal provisions of the RRA.

Intent is a state of mind which is generally proven by circumstantial evidence. *Riggin v. Department of Health & Human Services,* 13 M.S.P.R. 50, 52 (1982). The Board must also consider an appellant's plausible explanation as an element of the totality of the circumstances. *Nelson v. U.S. Postal Service,* 79 M.S.P.R. 314 9191 6-7 (1998). An appellant's intent may be referred from evidence of his reckless disregard for the truth or for ascertaining the truth, but the falsity of his statement does not by itself establish his intent. *See Mooney v. Department. of Defense,* 44 M.S.P.R. 524, 526-27 (1990). Proof of an the appellant's mistaken

view or misunderstanding, along with his disclosure of the facts surrounding the particular situation weigh against an inference of wrongful intent. *Howell v. Department of the Navy,* 35 M.S.P.R. 31, 37-38 (1987).

The agency defines willfulness in the context of 1203(b)(9) as a "voluntary, intentional violation of a known legal duty." *See United States v. Pomponio,* 429 U.S. 10, 12 (1976). Mr. Lamar testified he considered in the appellant's situation that the legal duty was the proper filing and payment of income tax liability. Hearing Transcript at 130. Mr. Lamar testified the legal duty was violated by the understatement of income, the overstatement of deductions and little or no documentation to support the deductions, in addition to a perceived lack of cooperation in the audit process. *Id.* Mr. Lamar considered the appellant's violation was intentional based on the appellant's background and experience, including past work in tax compliance. *Id.* Mr. Lamar testified the appellant knew the requirement to document his income and deductions, and he did not provide that information for the initial tax return or as a result of requests from the auditor. *Id.*

Mr. Lamar testified on cross examination that he equated the appellant's inability to state a good reason for the deductions he was taking as willful conduct. Hearing Transcript at 176. Mr. Lamar also testified he did not consider the possibility the appellant made the same errors about mortgage interest and interest income in 1997 and 1998 because the appellant was under the same misperception in both. *Id.* Mr. Lamar testified that in determining the appellant's intent, he considered the appellant knew or should have known about his tax obligations and the need to have documentation available for an audit. Hearing Transcript at 180. Mr. Lamar considered the appellant did not exercise prudent business care in safeguarding his records and did not cooperate with the auditor in timely responding to requests for information. Hearing Transcript at 180.

The question of the appellant's intent in completing his 1998

tax return depends on his credibility regarding the surrounding circumstances.[12] For the reasons discussed below, I find the appellant is not credible.

In addition to the general excuse of stress and chaos in his home situation, the appellant attributes his understatement of CD interest to lack of specific knowledge of the tax law regarding it, confusing bank statements, and relying on the 1997 return, in which he made the same error, as a template for the 1998 return. The appellant's testimony that the bank statements were confusing because they treated CDs and IRA CDs the same is contradicted by the Fleet Bank statements in the record, which make no reference to an IRA. Agency file tab 4k at *159-206.* The letter transmitting the bank records to Ms. Turowski during the audit did list a category, "CD/IRA Account", but that was not a document the appellant had when he prepared the return. That document was also the document cited by the appellant's expert, Professor Edwin T. Hood,[13] to show the bank records were confusing. Hearing Transcript at 194. Furthermore, on cross examination, the appellant was evasive when questioned about whether he had included the CD interest as income on the 1996 tax return. Hearing Transcript at *35 1-55.*

Professor Hood testified he would look at the end-of-year statement to determine what interest was taxable. Hearing Transcript at 222. Professor Hood acknowledged that the

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[12] To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version she believes, and explain in detail why she found the chosen version more credible, considering such factors as: (1) the witness's opportunity and capacity to observe the even or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987).

[13] Professor Hood is the Ruby B. Hulen Professor of Law at the University of Missouri, Kansas City.

financial institution's year-end tax information return was not among the appellant's documents he reviewed, and he had no way of knowing if it was confusing or not. *Id.* at *224-27.* I note the appellant was evasive about whether he received the bank's information return.

Accordingly, I find the appellant's testimony he was confused by the bank statements is not credible for either his 1997 or 1998 tax return, so his explanation that he merely repeated an error from 1997 is also not credible.

The appellant's testimony that he lacked knowledge of tax laws and regulations does not excuse his error. To the extent the appellant lacked such knowledge, it was because he made no effort to consult the available guidance but instead relied on his flawed perception. To the extent the appellant can claim ignorance of the law, he is still responsible for acting with reckless disregard of the law by failing to consult the agency's publications, directly or through the computer tax program he used or by seeking expert advice.

Coupled with the appellant's lack of credibility about the bank statements, I find it more likely true than not true that the appellant willfully failed to report the CD interest in the 1998 return. The appellant's contention that he would not have done so because he knew he would be audited is contradicted by his testimony he was surprised by the audit in 2000 and believed there would be no audits after talking with EDP classmates who also had not been audited.

With regard to including the TSP loan interest as a deduction, the appellant cited the technical nature of what constitutes mortgage interest as reasonable cause for his error. Professor Hood testified it was a common mistake for a taxpayer to claim an interest deduction for anything related to purchasing a house. Hearing Transcript at 193. Nevertheless, there is no evidence the appellant made any serious effort to confirm his perception that interest on a loan to obtain a down payment was deductible mortgage interest. In the absence of such an effort, I find the appellant acted with reckless disregard of learning the truth and his inclusion of

the TSP loan interest as a mortgage deduction was willful.

The appellant lacked documentation for his travel expenses in connection with his rental property. Professor Hood testified that Ms. Turowski should have allowed the appellant's rental expenses because there is a rule allowing for statements such as the appellant supplied to support a deduction. Hearing Transcript at 199-200. There is no evidence the appellant attempted to obtain documentation from the airline for the tickets he claimed as travel expenses related to the rental property. Such documentation would not have been affected by the loss of the appellants own documents whether he paid by cash, check, or credit card. I find the appellant willfully overstated his deduction for rental expenses. While the loss of boxes in a move may have been reasonable cause by itself, in view of the appellant's other errors and lack of credibility, it is more likely true than not true the appellant overstated rental expenses to which he knew he was not entitled.

With regard to his charitable contributions, the appellant admitted altering the Salvation Army receipts, originally given to Ms. Turowski, for his Tax Court appeal. On cross examination, the appellant admitted he did more than merely transfer information from the back of the receipt to the front as he claimed on direct examination; he also added descriptions of the donated items' conditions not previously there. The appellant's alteration of the receipts negatively impacts his credibility.

In addition, the appellant's testimony about his cash contributions is not credible. It is inherently improbable that he would give large cash donations to an institution without obtaining receipts to confirm the contribution, and I note he did not allege he received such receipts, which were subsequently lost but, rather, he kept personal notes of his donations. It is clear from appellant's cross- examination testimony that he suggested the amount, about $20 per week, in the statement from St. William's Church. That amount, however, is contradicted by the testimony of the appellant's

wife, who stated their church attendance in Massachusetts was basically confined to the holidays, and she never saw the appellant give a cash donation. Furthermore, the amount in the St. William's statement is different from the amount, $50-$100 per week, the appellant and his wife told Ms. Turowski, as recorded in her audit report. Agency file tab 4k at 12. In view of the contradictions in the appellant's version of his cash contributions to St. William's Church, I find Professor Hood's testimony that the appellant's substantiation of his charitable contributions was sufficient to be accepted in the audit (Hearing Transcript at 199) is not entitled to any probative weight.

Ms. Turowski testified that the appellant's subsequent production of documentation to support the non-cash contributions was close to the amount claimed for cash contributions but not substantiated with adequate documentation and appeared to be a flip-flop. Hearing Transcript at 98. Ms. Turowski considered this a "red flag" because the logical assumption would be that a person preparing the return would know the difference between cash and non-cash contributions and prepare the return correctly. *Id.* at 98-99. The appellant's inability to substantiate his cash contributions to the IRS's standard is not a justification for him to alter records to get what he believed he should get as a deduction. *Cf. Dogar v. Department of Defense*, 95 M.S.P.R. 52 ¶ 16 (2003) (in a false travel claim appeal, the appellant is not entitled to the amount he believes he is due but only to the amount substantiated by accurate information).

Professor Hood testified the omission of a state income tax refund is a common mistake. Hearing Transcript at 203. Given the appellant's assertion he used his 1997 tax return as a template for the 1998 return, he should have been on notice that he claimed a deduction for state income taxes that year and investigated whether he received a refund that required inclusion as income.

Although the appellant received credit for additional non-cash contributions during the audit and appeal process, that

increase, as noted by Ms. Turowski, approximated the disallowed cash contributions. Nevertheless, at the end of the process, the appellant's tax liability was increased for 1997 and 1998, including the imposition of an accuracy penalty for 1998. The appellant was reluctant to acknowledge the penalty, asserting there were too many crises for him to seek abatement of the penalty as he had successfully done for the 1997 penalty. Hearing Transcript at 311-12.

In summary, I find the agency has established by preponderant evidence the appellant willfully understated his 1998 Federal tax liability and violated section 1203(b)(9) of the *RRA*. The appellant provided false statements in support of his 1998 tax return, and his testimony during the Board hearing was evasive, contradictory, and false on material points regarding his 1998 tax return. The appellant also failed to provide complete and accurate information to support his 1998 return. *Cf United States v. Welsh*, 627 F.2d 88, 92 (7th Cir. 1980) (false statements and failure to provide complete and accurate records are circumstances establishing willful intent evade taxes).

AFFIRMATIVE DEFENSES

The appellant alleges the agency committed a prohibited personnel practice and committed harmful procedural error by citing in its proposed removal one reason with two specifications, one of which had different "burdens of determination" than the cited reason for the proposed removal; by the Review Board not properly considering the appellant's case; and by processing the appellant's removal under section 1203(b)(9) without a final administrative determination as required by law. The appellant has the burden of proving his affirmative defenses by a preponderance of the evidence.

Prohibited Personnel Practice

The appellant's prohibited personnel practice claim is based on the agency's alleged violation of 5 U.S.C. §

2302(b)(12), which prohibits taking an action if it violates any law, rule, or regulation implementing the merit system principles. The appellant contends that 5 U.S.C. § 3131(7)[14] was violated by the agency's action, and a violation of that statute is a prohibited personnel practice under *Special Counsel v. Harvey,* 28 M.S.P.R. *595* (1984).[15] The appellant bears the burden of proof on this issue, by preponderant evidence. *See* 5 U.S.C. § 7701(c)(2)(B); 5 C.F.R. § 1201.56(a) (2004).

It is a fundamental principle of statutory construction that the specific governs over the general. *Schott v. Department of Homeland Security, 97* M.S.P.R. 35, 40 (2004), *citing Morales v. Trans World Airlines, Inc., 504* U.S. 374, 384, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992). This is true regardless of the order in which statutes are enacted: "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari,* 417 U.S. 535, 550-55 1, 94 S.ct. 2474, 248283, (1993).

Accordingly, I find the specific prohibitions of section 1203(b) of the RRA prevail over the more general principle identified in 5 U.S.C. § 3131(7). The appellant therefore has not established the agency committed a prohibited personnel practice by applying the mandatory removal provision of the RRA for his willful understatement of 1998 tax liability.

Harmful Procedural Error

Reversal of an action is warranted only where procedural

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[14] 5 U.S.C. §3131 states in relevant part, "The Senior Executive Service shall be administered so as to-...(7) protect senior executives from arbitrary or capricious actions;...

[15] The case cited by the appellant was reversed by the U.S. Court of Appeals for the District of Columbia. *See Harvey v. Merit Systems Protection Board,* 802 F.2d 537 D.C. Cir. 1986). The Court of Appeals noted the Board's reasoning in finding section 3131(7) was a law implementing the merit system principles was "circuitous, at best" but did not reach the issue because it found the charges against the appellant were not supported by substantial evidence. *Id.* At 544 n.1.

error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency. *Baracco v. Department of Transportation*, 15 M.S.P.R. 112, 123 (1983), aff'd, 735 F.2d 488 (Fed. Cir.), *cert. denied*, 469 U.S. 1018 (1984).

The appellant contends the agency's action charging him in the alternative was arbitrary and harmful procedural error. The appellant, however, has cited no law, rule, or regulation that prohibits an agency from charging misconduct in the alternative. By placing the appellant on notice in the proposal that the understatement of his tax liability for 1998 was being charged as a violation of section 1203(b)(9) and as violation of the Standards of Conduct, the agency satisfied the due process requirement of putting the appellant on notice of the bases for the agency's action. Agency file tab 4g.

Even if it were error for the agency to charge in the alternative, the appellant has not shown he was harmed by it. The appellant has not alleged or shown he did not understand the proposal to remove him, and therefore has not shown he was harmed by the form in which the agency stated its proposal.

The appellant's contention that the agency's charge in the alternative precluded consideration of the *Douglas* factors is without merit. When asked if he could appropriately assess the *Douglas* factors after first determining the appellant's conduct violated the RRA, Mr. Lamar noted that the first specification (regarding the 1997 return) was not covered by the RRA and required his consideration of the *Douglas* factors. Hearing Transcript at 177. Mr. Lamar testified credibly and at length regarding his view of the *Douglas* factors and their application to the appellant's situation. Hearing Transcript at 128; 147-61 & 177. Although the appellant contends Mr. Lamar could not have considered the factors properly, there is no evidence that supports his view, and removal for the appellant's 1997 and 1998 understatement of Federal tax liability would not be outside the tolerable bounds of reasonableness. *See, e.g., Baracker v.*

Department of the interior, 70 M.S.P.R. *594, 606* (1996) (an agency is entitled to hold SES employees to a very high standard of conduct and the fact some lesser-graded employees receive less severe penalties for similar misconduct may not warrant mitigation).

The appellant contends removal is mandatory under the RRA only after a final administrative or judicial determination that an employee committed one of the infractions cited in section 1203(b), and that no final administrative determination had been made. The appellant also contends the agency Review Board did not properly consider his case when it was referred by Mr. Lamar.

Mr. Lamar testified the agency procedure required him to forward the appellant's case to the Review Board after determining that the appellant's conduct was willful. Hearing Transcript at 143. Mr. Lamar further testified his decision that the appellants conduct was willful was the agency's final administrative decision within the meaning of section 1203(a). Hearing
Transcript at 166. Mr. Lamar testified that was in accordance with the agency's procedures and the advice he received from the labor relations office and the agency's counsel. *Id.* at 167.

The appellant argues a deciding official cannot properly make the final administrative decision because penalties will be inconsistent, as illustrated in Appellant's Exhibit E, and the determination by the deciding official occurs before administrative review by the Merit Systems Protection Board.

In *Tablerion,* the U.S. Court of Appeals for the Federal Circuit held that under the RRA, an outside agency, such as an arbitrator, could only review whether the alleged violation occurred and apply an objective standard. I find that under the logic of the court's decision in *Tablerion,* the agency's system identifying the deciding official as the maker of the final administrative decision is not harmful error or a denial of due process but fulfills the requirements of the RRA, which holds IRS employees to a higher standard regarding discipline for tax matters.

In summary, I find the appellant has not established the agency committed harmful procedural error in its removal action against him.

EFFICIENCY OF THE SERVICE

When an agency removes an SES employee, the agency is not required to establish the removal promotes the efficiency of the service. *Shenwick v. Department of State,* 92 M.S.P.R. 289 (2002); *Baracker v. Department of the interior,* 70 M.S.P.R. *594, 597-98* (1996).

PENALTY

The penalty of removal is not reviewable by the Board because the agency established by preponderant evidence the appellant willfully understated his 1998 Federal tax liability, an offense for which removal is mandatory under the RRA. Moreover, as discussed above with regard to the appellant's affirmative defense, the agency established it considered the *Douglas* factors and removal was not outside the tolerable bounds of reasonableness.

DECISION

The agency's action is AFFIRMED.

FOR **THE BOARD**:
/s/ Mary L. Detjen

Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **March 9. 2005.** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date

because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. The date of filing by mail

is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See 5* C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, **DC 20439**

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.
If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title *5* of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents .html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

05-3156
WILLIAM M. ROBERTSON, Petitioner,

v.

DEPARTMENT OF THE TREASURY, Respondent.

Judgment

ON PETITION for review of the Merit Systems Protection Board in CASE NO(S).CH0752040138-I-1.
This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam *(BRYSON*, Circuit Judge, ARCHER, Senior Circuit Judge, and GAJARSA, Circuit Judge.)

AFFIRMED. See Fed. Cir. R.36

ENTERED BY ORDER OF THE COURT

DATED: MAY 4, 2006

/s/ Jan Horbaly

Jan Horbaly, Clerk

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CENTRAL REGIONAL OFFICE

WILLIAM M. ROBERTSON,
Appellant,
v.
DEPARTMENT OF THE TREASURY,
Agency.

DOCKET NUMBER
CH-0752-04-0138-11

DATE: April 9, 2004

ORDER AND SUMMARY OF TELEPHONIC PREHEARING CONFERENCE

On April 7, 2004, I held a telephonic prehearing conference with the appellant's and the agency's representatives.

Issues

The agency removed the appellant from his SES position on a charge of failure to properly file his Federal income tax returns. The charge is supported by two specifications, the first for his 1997 cation is charged in the alternative as a willful violation and without the element of willfulness. The agency has the burden of proving the facts of its charges by preponderant evidence. However, the appellant reached a settlement of his appeal challenging the audit; the settlement resulted in an agreement that income was understated and that deductions were overstated. I find collateral estoppel applies to the tax appeal, and the agency has established that the appellant's tax returns for 1997 and 1998 were not properly filed.

The issues for consideration are (1) whether his improper filing is constituted misconduct, neglect of duty, malfeasance under *5* U.S.C. § *7543;* and (2) whether his failure to properly file his 1998 return was willful under 1203(b)(9); and if not, what is the appropriate penalty under *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981).

Affirmative Defenses

The appellant alleges the agency committed a prohibited personnel practice and harmful procedural error. The appellant has the burden of proving his affirmative defenses by a preponderance of the evidence.

The appellant's prohibited personnel practice claim is based on the agency's alleged violation of 5 U.S.C. § 2302(b)(12), which prohibits taking an action if it violates any law, rule, or regulation implementing the merit system principles. The appellant contends that 5 U.S.C. § 3131(7), which protects senior executives from arbitrary or capricious action was violated by the agency's action.

The appellant alleges the agency committed harmful procedural error because the agency's review board did not thoroughly review the evidence before recommending (or directing) the appellant's removal, and it charged the appellant in the alternative, which had the effect of denying him an assessment of the appropriate penalty under *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981). Reversal of an action is warranted only where procedural error, whether regulatory or statutory, likely had a harmful effect upon the outcome of the case before the agency. *Baracco v. Department of Transportation,* 15 M.S.P.R. 112, 123 (1983), *aff'd,* 735 F.2d 488 (Fed. Cir.), *cert. denied,* 469 U.S. 1018 (1984).

The appellant also raised the issue of whether the TRRA applied in this case because there has been no final judicial or administrative determination of his case. During the conference, I was unsure about whether this was a substantive right that would result in reversal of the agency's action if it was not met or a harmful procedural error. Based on my subsequent research, I believe this is also a claim of harmful procedural error rather than an issue that would reverse the agency's action outright.

Witnesses

The agency requested the following witnesses: (1) Ethne Lee Turowski; and (2) Henry 0. Lamar, Jr. The appellant did not object to the agency's requested witnesses.

The appellant requested the following witnesses: (1) Darlene Smink; (2) Edwin T. Hood; (3) Henry 0. Lamar; (4) Chair of Review Board; and *(5)* Appellant. The agency objected to the relevance of the Board Chairman, and I sustained the objection. The procedures and working of the review board are not matters that I consider within my jurisdiction.

Exhibits

The agency requested the following additional exhibits: (1) March 2, 2001 Memorandum on Timely Filing and Payment of Taxes; (2) Internal Revenue Manual Penalty Handbook, section 20.1 overrule; (3) SES Development Program Frequently Asked

Questions; (4) Fax from the appellant to Sabra Klein; and *(5)* Excerpt from Internal Revenue Manual, Wage & Investment Organization and Staffing, sections 1.1.1310.4.4. The appellant objected to Exhibits 1,2,3, and *5* on the ground that they were issued after the tax returns in question. I sustained the objections to exhibits 1, 3, and 5. 1 overruled the objection to exhibit 2 because the penalty decision occurred after its issuance.

The appellant requested the following exhibits: (A) Appellant's appraisal for October 1, 2002, through September 30, 2003; (B) agency's March 9, 2004 response to supplemental interrogatories; (C) Guide to Section 1203 IRS Restructuring and Reform Act of 1998 overrule; (D) Agency's January 30, 2004 response to Interrogatories and Admissions; (E) Semi-Annual Disciplinary Actions Report July 1-December 31, 2002; (F) Salvation Army receipt August 1, 1997 (in agency 4); (G) April 18, 2001 Review Board Mitigation of Penalties; (H) Resume of expert Hood; (1) October 1, 2002 settlement of 1998 return; (J) Moving loss claim (10 self-pack boxes); and (K) bill for children's counseling expenses. The agency objected to exhibits C, G, and K on the ground of relevance. I sustained the agency's objection to exhibit K and overruled the objections to exhibits C and G.

Corrections to the Memorandum

If a party believes that this is an incorrect summary of the prehearing conference, that party must so notify me as soon as possible. In the absence of any such notice, the rulings contained in this Order are final, and will not be modified without a showing of good cause. On the record at the beginning of the hearing, the parties may state their objections to any of the rulings made during the telephonic pre-hearing conference.

FOR THE BOARD: /s/ Mary L. Detjen

Administrative Judge

Part III. Administrative, Procedural, and Miscellaneous

Notice 99-27

SECTION I. PURPOSE

Section 1203 of the Internal Revenue Service Restructuring and Reform Act of 1998 (the "RRA") provides generally that IRS employees must be terminated from Federal employment if they violate certain rules in connection with the performance of their official duties. The statute also allows the Commissioner to mitigate the sanction of termination. This Notice requests public comments on the proper interpretation of section 1203.

SECTION II. BACKGROUND

The basic rules governing disciplinary actions against federal civilian employees are set forth in Chapter 75 of Title 5 of the United States Code. In general, these rules permit discipline, up to and including termination of employment, to be imposed for such cause as will promote the efficiency of the federal service. Agencies generally have discretion as to whether to impose disciplinary action and as to the form and severity of the action to be imposed, based upon the facts and circumstances of the situation. Most agency decisions concerning the imposition of discipline are subject to review by parties outside the agency, e.g. in arbitration or by an appeal to the Merit Systems Protection Board.

RRA section 1203 made significant changes in these general rules as applied to IRS employees. Specifically, section 1203 provides that an IRS employee must he terminated from employment if there is a final administrative or judicial determination that the employee violated any of the rules set forth in sections 1203(b)(I)—(10) in the performance of official duties. In addition, section 1203(c) of the statute provides that the Commissioner may decide to

take a personnel action other than removal if certain mitigating factors are present; however, this decision may only be made by the Commissioner personally and is not subject to review in any administrative or judicial proceeding. The full text of section 1203 is attached at Appendix A.

SECTION III. INTERPRETATION OF SECTION 1203
The Internal Revenue Service requests comment with respect to the following matters under RRA section 1203:

A. Existing personnel law and procedures will be applied in interpreting section 1203, unless explicitly provided otherwise. For example, current procedural requirements of personnel law, including advance written notice, an opportunity for an oral and written reply, and a right to appeal the substance of the charges, will be provided employees who are subject to discipline under section 1203.

B. The current personnel law definition of "employee" will he applied in interpreting section 1203. Section 1203 is triggered with respect to 'any employee" of the IRS. In implementing section 1203, the IRS will apply the definition of "employee" in 5 U.S.C. 2105, that is, an individual who is appointed in the civil service, engaged in the performance of a Federal function under authority of law, and subject to the supervision of an individual already appointed in the civil service while engaged in the performance of the duties of the position. As a consequence of this definition, and since section 1203 applies only to acts or omissions of an employee of the IRS, any acts or omissions that occurred prior to the individual becoming an "employee" of the IRS would not be within the scope of section 1203.

C. Acts or omissions of IRS employees committed "in the performance of the employee's official duties" include only those acts or omissions listed under section 1203(b) that have a nexus to an employee's position in the IRS. To establish

nexus, a clear and direct relationship must he demonstrated between the act or omission of the employee that constitutes the grounds for the employee's removal and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate governmental interest promoting the "efficiency of the service," as required by 5 U.S.C. 7513(a). *See, Doe* v. *Hampron,* 566 F.2d 265, 272 (D.C. Cir. 1977).

Example 1. While at home after duty hours, an IRS employee becomes involved in a physical argument with his neighbor. The neighbor sues the employee for assault and battery and a court finds the employee liable for civil assault and battery. Is the agency mandated to terminate the employment of the employee pursuant to section 1203?

Answer. No. Section 1203 is triggered only with respect to acts or omissions committed in the performance of the employee's official duties. Under the facts presented here, the IRS employee's conduct was off-duty conduct having no connection to the IRS. Therefore, the civil judgment finding the employee liable for assault and battery on his neighbor would not fall under section 1203(b)(5). Additionally, the assault and battery was not "on a taxpayer, taxpayer representative, or other employee of the IRS," as is required by section 1203(b)(5). See F. for a discussion of the meaning of taxpayer and taxpayer representative.

Example 2. A taxpayer tells the Internal Revenue Agent who is auditing the taxpayer that the Agent is incompetent. While off duty, the Agent sees the taxpayer at a restaurant and tells him that he did not appreciate the comment. The Agent pushes the taxpayer. A court finds the Agent liable for civil assault and battery. Is the agency required to terminate the employment of the employee pursuant to section 1203?

Answer. Yes. Under the facts presented, the physical altercation, while occurring off-duty, resulted from the Agent's interaction as an IRS employee with the taxpayer. Thus, the Agent's off duty conduct has a nexus, or a clear and direct relationship, to the efficiency of the service. Therefore, the civil judgment finding the employee liable for civil assault and battery would fall within the scope of section 1203(h)(5).

D. Acts or omissions of Internal Revenue Service employees will be subject to the discipline prescribed by section 1203 only if those acts are taken, or those omissions are made, with some degree of intent.

Some of the acts or omissions specified in section 1203 that are subject to the discipline prescribed by that section appear to be based upon standards that are found in the Internal Revenue Code (IRC). Thus, section 1203 (h)(8) mandates removal of an IRS employee whose "failure to file any return of tax required under the Internal Revenue Code ... on or before the date prescribed therefor" was "willful." This language mirrors that found in IRC section 7203. Similarly, section 1203 (b)(9) mandates removal of an employee whose "understatement of Federal tax liability" was "willful." This language implicates concepts found in IRC section 7201. The IRS will employ standards similar to those applicable to these IRC provisions in implementing sections 1203(b)8) and 1203(h)(9). To support an action under either of these sections, the IRS must prove by a preponderance of the evidence that the IRS employee's act or omission was a voluntary, intentional violation of a known legal duty.

Section 1203(b)(l) requires removal of an IRS employee who willfully fails to obtain signatures on documents authorizing the seizure of certain types of property. Section 1203(b)(7) requires removal of employees who engage in "willful" misuse of IRC section 6103 "for the purpose of concealing information from a congressional inquiry." In

order to support an action under either of these provisions, the IRS must prove by a preponderance of the evidence that the employee's act or omission was made with actual knowledge of the failure to comply with, or with a reckless disregard of the requirements for obtaining approval signatures or for disclosing information in response to a congressional inquiry, as the case might be.

E. A final administrative or judicial determination pursuant to section 1203(a) is a determination concerning an individual in a proceeding in which the individual is granted full rights to participate as a party to the action or proceeding. Such a determination becomes final when:

(1) if a judicial proceeding, all appeals have been exhausted or, if no appeals are taken, the time for all appeals has expired; or

(2) if an administrative proceeding:

(i) all appeals have been exhausted, or if no appeals are taken, the time for all appeals has expired. or

(ii) a disciplinary decision is made by the deciding official at the conclusion of a process that included an advance written notice to the individual of the proposed action to be taken.

Example 1. A finding is made in an EEO case that an IRS employee has been discriminated against in violation of Title VII of the Civil Rights Act of 1964, Is the finding of discrimination a final administrative determination such that section 12303(a) would require the removal of all IRS employees whose conduct may have contributed to the finding of discrimination?

Answer: No. Equal Employment Opportunity cases are filed against the agency, and not against specific individual employees. Therefore, IRS employees, other than the complainant, are not parties to the proceeding, and consequently are not afforded the opportunity to submit evidence or to call or cross-examine witnesses. The finding

in the EEOC decision concerning discrimination is not a final administrative determination within the meaning of section 1203 with respect to IRS employees whose conduct may have contributed to the finding.

However, in every case in which there is a finding of discrimination, the finding will he reviewed by the Office of the National Director, EEO and Diversity, pursuant to specific procedures established by the IRS. These procedures will require that the Office of the National Director, EEO and Diversity, determine whether to refer the matter to the appropriate office for further action. If management makes a determination that any employee committed an act or omission within the coverage of section 1203(b), the employee will be issued advance written notice of the proposal to remove the employee from the IRS. The statutory and regulatory requirements of Title 5, United States Code, and Title 5, Part 752, Code of Federal Regulations (CFR), must be followed in terminating the employment of the employee under section 1203. Moreover, the final decision to remove the employee from the IRS is subject to appeal, such as to the Merit Systems Protection Board (MSPB). While the employee may challenge the charges, a reviewing body may not mitigate the adverse action of removal if the facts establish a violation of section 1203.

Example 2. An IRS employee files a formal complaint of discrimination, alleging that his manager has retaliated against him by giving him a low performance evaluation because of the employee's prior EEO activity. The case is settled, and a settlement agreement is signed. Is this a final administrative determination that the manager has violated section 1203(b)?

Answer: No. A settlement agreement is not a determination that discrimination has occurred. Further, the manager was not a party to the discrimination complaint process or to the settlement agreement. The parties are the agency and the

employee alleging discrimination. Therefore, the analysis set forth in Example I is also applicable to this situation.

In addition, cases in which an allegation of discrimination is raised, but there is no finding or settlement, will be referred to an appropriate office to determine whether there should be further action.

F. "Taxpayer," "taxpayer representative," and "person" will have the following meanings:

A "taxpayer" means any person subject to any internal revenue Law, and with respect to whom an act or omission is undertaken because of that person's status as a taxpayer.

A "taxpayer representative" means any person who acts in a representative capacity to a taxpayer, and with respect to whom an act or omission is undertaken because of that person's status as a representative of a taxpayer.

A "person" includes an individual, trust, estate, partnership, association, Company or corporation.

Example 1. An IRS employee is stopped by a police officer for speeding. The employee tells the police officer that he will be audited if the employee receives a ticket. The police officer does not have an open, ongoing dispute with the IRS. Does the employee's conduct come within the scope of section 1203(b)(10)?

Answer. Yes. The definition of taxpayer does not require that the person have an ongoing dispute with the IRS. The police officer fits the definition of a taxpayer since the employee's conduct is directed toward the police officer *because* that officer is subject to the internal revenue laws. Additionally, the purpose of the IRS employee's conduct was to extract personal gain or benefit. Based on these facts, a nexus would also exist (see **C.** above).

Example 2. A taxpayer service representative is driving her car and sees an empty parking spot. Before the taxpayer service representative can pull into that parking space,

another driver parks her car there. Unknown to the employee, the other person represents taxpayers. The employee, unable to control her anger, shoves the taxpayer representative and is eventually criminally convicted of assault and battery. Does the employee's conduct come within the ambit of section 1203(b)(5)?

Answer: No. The employee's conduct, although directed against someone who represents a taxpayer, was not directed against that individual *because* she represents a taxpayer. The employee did not know the individual represented taxpayers, and even if she had known, her conduct toward the representative was unrelated to that individual's capacity as a representative. Therefore, the employee's conduct does not constitute an assault and battery upon a taxpayer representative.

G. The false statement referred to in subsection 1203(h)(2) must be with respect to a material matter involving a taxpayer or taxpayer representative, as those terms are defined in F. To be material, the false statement must be one that would have a natural tendency to influence, or be capable of influencing, a decision on the matter involving a taxpayer or taxpayer representative.

Example 1. A Revenue Agent intentionally falsely states under oath that a taxpayer had shown him receipts to document a particular deduction when he had not seen any such receipts. Is this false statement within the coverage of section 1203(b)(2)?

Answer: Yes. The Revenue Agent's false sworn statement that the taxpayer had shown him receipts to document a particular deduction would have a natural tendency to influence, or the capacity to influence, a decision on the matter involving the taxpayer or taxpayer representative. Thus, it is within the coverage of section 1203(b)(2).

Example 2. A Revenue Officer is being questioned about his use of annual leave. The Revenue Officer provides a statement to the Treasury Inspector General for Tax Administration, under oath, in which he intentionally falsely states that he was at the office all day each of the prior six Fridays. Is this false statement within the coverage of sect ion 1203(b)(2)?

Answer: No. The Revenue Officer's false statement to the Treasury Inspector General for Tax Administration does not have a natural tendency to influence, or the capacity to influence, a decision on a matter involving a taxpayer or taxpayer representative. Therefore, it would not be within the coverage of section 1203(b)(2). However, even though the IRS would not be required to terminate the employment of the Revenue Officer pursuant to section 1203(b)(2), the IRS may discipline the Revenue Officer up to and including termination from Federal service.

H. Section 1203 applies only to acts or omissions occurring on or after July 22, 1998. This position is based on existing law regarding the retroactivity of civil statutes. *See. Taylor v. Rubin,* No. 97- 2398 (W.D. L.A Sept. 21, 1998). In general. where statutory provisions are substantive, in that they create new rights or impair vested rights, impose new duties, or attach new disabilities regarding past transactions, as opposed to merely procedural provisions, the rule is that the provision will not apply retroactively absent a clear congressional intent otherwise. *Landgraf v. USI Film Products,* 114 S.Ct. 1483 (1994) (holding that punitive and compensatory damages provision of the 1991 Civil Rights Act amending Title VII did not apply retroactively to a case that was pending when the statute was enacted. since there was not clear congressional intent concerning retroactivity). See *a/so Hughes Aircraft Co. v. US. Ex Re!. Schumer,* 117 S. Ct. 1871, 1876 (1997) (The Court affirmed the "time-honored" presumption against giving retroactive effect to legislation unless Congress had clearly manifested its intent

to the contrary, holding that a 1986 amendment to the *qui tam* statute which would deprive defendant of a defense, did not apply retroactively).

SECTION IV COMMENTS

Comments are requested on the matters discussed in this notice and on any other provisions of section 1203. Comments should be submitted by June 30, 1999. Written comments may be submitted to the Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Attention: CC:DOM:CORP:R (Notice 99-27), Room 5226, Washington, DC 20044. Submissions may be hand-delivered between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (Notice 99-27), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue N.W. Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at: http://www.irs.ustreas.gov/ prod/tax_regs/comments.html

Comments will be available for public inspection and copying.

For further information regarding this notice, contact Lee Patton of the Office of Associate Chief Counsel (Finance & Management), General Legal Services Division, at 202-283-7900 (not a toll-free call).

APPENDIX A

SEC. 1203. TERMINATION OF EMPLOYMENT FOR MISCONDUCT

(a) IN GENERAL—Subject to subsection (c), the Commissioner of Internal Revenue shall terminate the employment of any employee of the Internal Revenue Service if there is a final administrative or judicial

determination that such employee committed any act or omission described under subsection (b) in the performance of the employee's official duties. Such termination shall be a removal for cause on charges of misconduct.

(b) ACTS OR OMISSIONS—The acts or omissions referred to under subsection (a) are—

(1) willful failure to obtain the required approval signatures on documents authorizing the seizure of a taxpayer's home, personal belongings, or business assets;

(2) providing a false statement under oath with respect to a material matter involving a taxpayer or taxpayer's representative;

(3) with respect to a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, the violation of

(A) any right under the Constitution of the United States: or

(B) any civil right established under-

(i) title VI or VII of the Civil Rights Act bf 1964;

(ii) title TX of the Education Amendments of 1972;

(iii) the Age Discrimination in Employment Act of 1967;

(iv) the Age Discrimination Act of 1975;

(v) section 501 or 504 of the Rehabilitation Act of 1973; or

(vi) title I of the Americans with Disabilities Act of 1990:

(4) falsifying or destroying documents to conceal mistakes made by any employee with respect to a matter involving a taxpayer or taxpayer representative:

(5) assault or battery on a taxpayer, taxpayer representative, or other employee of the Internal Revenue Service, but only if there is a criminal conviction, or a final judgment by a court in a civil case, with respect to the assault or battery;

(6) violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service (including the internal Revenue Manual) for the purpose of retaliating against, or harassing, a taxpayer. taxpayer representative, or other employee of the Internal Revenue Service;

(7) willful misuse of the provisions of section 6103 of the Internal Revenue Code of 1986 for the purpose of concealing information from a congressional inquiry;

(8) willful failure to file any return of tax required under the Internal Revenue Code of 1986 on or before the date prescribed therefor (including any extensions, unless such failure is due to reasonable cause and not to willful neglect.

(9) willful understatement of Federal tax liability, unless such understatement is due to reasonable cause and not to willful neglect. and

(10) threatening to audit a taxpayer for the purpose of extracting personal gain or benefit.

(c) DETERMINATION OF COMMISSIONER.—

(1) IN GENERAL—The Commissioner of Internal Revenue may take a personnel action other than termination for an act or omission under subsection (a).

(2) DISCRETION.—The exercise of authority under paragraph (1) shall be at the sole discretion of the Commissioner of Internal Revenue and may not be delegated to any other officer. The Commissioner of Internal Revenue, in his sole discretion, may establish a procedure which will be used to determine whether an individual should be referred to the Commissioner of Internal Revenue for a determination by the Commissioner under paragraph (1).

(3) NO APPEAL—Any determination of the Commissioner of Internal Revenue under this subsection may not be appealed in any administrative or judicial proceeding.

(d) DEFINITION.—For purposes of the provisions described in clauses (i), (ii), and (iv) of subsection (b)(3)(B), references to a program or activity receiving Federal financial assistance or an educational program or activity receiving Federal financial assistance shall include any program or activity conducted by the Internal Revenue Service for a taxpayer.